LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

MARCH TERM, 1976

No. 75-1245

ROY PAULEY AND DONALD WILMOTH
D/B/A Ziebart Auto Truck Rustproofing
Petitioners,

vs.

ZIEBART PROCESS CORPORATION
A Corporation
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GARIS L. PRUITT
P. O. Box 405
Ashland, Kentucky 41101

Printed by CUMPTON'S PRINTING CO.

INDEX

TABLE OF CONTENTS

QUESTION PRESENTED 2

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED 2

1. 28 U. S. C. 1331 and 1332
2. Federal Rules of Civil Procedure 41 (b)
3. Local Rule 1.05 (e)
4. U. S. Constitutional Amendment 5

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

PROOF OF SERVICE 7

INDEX TO APPENDIX

28 USC 1331 (a) 1-A

28 USC 1332 . . . . . 1-A

FRCP 41B 1-A

Order District Court of April 30, 1975 Dismissing Complaint 2-A

Fourth Circuit Opinion of December 3, 1975, affirming District Court's dismissal 4-A

Docket Schedule U. S. District Court 6-A

TABLE OF CASES

LINK v. WABASK R. CO. (1962)
370 US 626 (1962) . . . . . .

REIZAKIS v. LOY
430 F 2d 1132 (1974) . . . . . .

IN THE

Supreme Court of the United States

MARCH TERM, 1976

No. .....

ROY PAULEY AND DONALD WILMOTH
D/B/A Ziebart Auto Truck Rust Proofing
Petitioners,

v.

ZIEBART PROCESS CORPORATION,
A Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MAY IT PLEASE THE COURT:

I. The case below is unreported and ordered not to be reported. It is appended hereto at page 4A of the appendix.

II. The jurisdiction of this Court is based on:

(i) The date of entry of the order appealed from is December 3, 1975 and time of entry is unknown.

(ii) There is no order of rehearing nor extension of time for filing a petition for Certiorari.

(iii) The statutory provision conferring jurisdiction on this Court to review the judgment of the Fourth Circuit is Title 28 United States Code Section 1254 Subsection (1).

QUESTION PRESENTED

The Fourth Circuit Court of Appeals erred in affirming the involuntary dismissal of the petitioners complaint with prejudice for failure to prosecute the action under F.R.C.P. 41 (b) Because there was no history of deliberate delay, nor was the Plaintiff Petitioners responsible for the extreme dereliction of the Plaintiff Petitioner's Attorney. The Defendant did not appear of record to be prejudiced in any serious manner. And such dismissal is contrary to the Fifth Amendment of the Constitution of the United States.

APPLICABLE LAW

1. 28 U.S.C. 1331 and 1332 (Appendix)
2. Federal rules of civil procedure 41 (b) (Appendix)
3. Local rule 1.05 (e), Rules of District Court, Southern district of West Virginia. "No attorney who has entered his appearance in any civil or criminal action shall withdraw his appearance or have it stricken from the record except by leave of the court entered of record."
4. United States Constitution Amendment 5 "No person shall – be deprived of life, liberty, or property without due process of law. . . "

BLEED THROUGH

STATEMENT OF THE CASE

Petitioners filed his complaint, signed by him and his attorney, Stephen P. Meyer, Charleston, West Virginia on December 4, 1973 in the United States District Court for the Southern District of West Virginia, at Charleston.

In his complaint he alledged Diversity of Citizenship with the Respondents and federal questions; the action was for breach of a franchise agreement and damages.

The respondent was served by serving the State Auditor of the state of West Virginia and return was filed thereon December 11, 1973.

On January 7, 1974 the defendant filed a motion to dismiss alleging that the respondent was not doing business in the state of West Virginia and not subject to service of process there, and filed a supporting affadavit by E. J. Hartman, President and Chairman of the Board stating this as fact.

The Respondent then answered on the merits by filing an answer and counterclaim filed on February 8, 1974. A hearing was held before the Court on January 28, 1974 and the Court denied the motion to dismiss.

The answer denied the operative facts of the complaint and attacked the jurisdiction of the Court to hear the same. The counterclaim prayed for $328.00 owed the respondent and for return of certain tools and for injunctive relief.

The petitioners filed an answer to the counterclaim on February 9, 1974 said answer generally denied the allegations in the counterclaim.

On June 6, 1974 the Respondent filed notice to take the discovery deposition of Roy Pauley and Donald Wilmoth, the Petitioners, to be taken on June 25, 1974.

The Petitioners nor their attorney appeared for that deposition, apparently because the attorney for the Petitioners could not contact them. The record showed Wilmoths wife was on her deathbed and that Pauley was trying to arrange for Wilmoth to give his deposition but Petitioner's attorney didn't relay this to Respondent's attorney.

On July 18, 1974 the respondent filed a motion to dismiss, and notice of hearing, with affadavits and exhibits attached. The affadavit was of the counsel for the Respondent stating

that he properly noticed the Petitioners for the deposition and that counsel for the Petitioners had stated to him that he could not reach them. The exhibit was a deposition of the court reporter, allegedly taken by agreement with counsel for Petitioners, but said agreement does not appear of record. The deponemt stated that the Petitioners did not appear at the June 25, 1974 deposition. The attorney for the Petitioners did not appear at this deposition either.

On September 12, 1974 the Respondent filed notice of depositions of Roy Pauley and Donald Wilmoth again. This appears on the court docket as having been filed on August 12, 1974, an apparent error. Said deposition was set for September 30, 1974. And was, pursuant to agreement continued to September 30, 1974; at which time the said Roy Pauley and Donald Wilmoth appeared and gave their testimony.

On October 15, 1974 the trial court overruled the respondents motion to dismiss, but put the Petitioners on notice to properly appear when noticed and to pay the costs and attorneys fees of the June 25 deposition.

On November 27, 1974 the depositions of the petitioners were filed.

On January 3, 1975 a pre-trial conference was held, Attorneys for Petitioners and Respondents were present but neither the Petitioners nor the Respondents were there. The Court set April 30, 1975 as trial date and ruled all discovery would be completed and all documents would be exchanged by February 1, 1975, and that all motions and briefs should be filed by the parties no later than April 1, 1975 and that pre-trial briefs should be filed no later than April 15, 1975. This order was entered on January 27, 1975. Further in the same order the Petitioners were directed to pay ($227.60) as costs related to the June 25, 1974 deposition to be paid within ten days.

The records reveals neither party filed motions, pre-trial briefs, filed interrogotories, filed proposed instructions, exchanged witness lists or did any other thing normally associated with trial preparation, with the exception of subpoenas filed on April 28, 1975 on behalf of the respondent.

On April 30, 1975 Roy Pauley appeared with Honorable Stephen Meyers, Counsel of record and Honorable Thomas Chattin.

BLEED THROUGH

The Court delayed the jury because it had received information that the "plaintiff's may not be ready for trial." (The source of this information is not shown of record).

The Court questioned Mr. Meyers who responded that two days prior he had been discharged by Mr. Pauley and Mr. Pauley had retained Mr. Chattin on Saturday April 27, 1975 because Mr. Meyer had done nothing to prepare the case for trial. Mr. Chattin responded that he had only represented Mr. Pauley for a month on other matters and that the previous week Mr. Pauley expressed concern whether Mr. Meyer had the case ready for trial and asked him to review it. Mr. Chattin said that on April 27, 1975 he reviewed the filed and told Mr. Pauley that there was no discovery in it at all and that he could not get it ready for trial by April 30, 1975 but that he would serve as Co-counsel with Mr. Meyer. And that Mr. Chattin was never officially retained. Mr. Meyer stated he did not want to go forward with the trial because he had been discharged on April 27, 1975. The court questioned Mr. Meyer about local rule 1.05 (e) which requires leave of the Court to withdraw, Mr. Meyers stated he knew the rule but did not want to go forward.

The Court then dismissed the case pursuant to F.R.C.P. 41 (b) and on the same day the Court entered a written order presented by the Respondents dismissing the Petitioner's complaint without formal findings of facts and conclusions of law, and did so with prejudice, with costs against the Petitioners, to which the Petitioners objected.

The Petitioners filed Notice of Appeal on May 7, 1975 and on the same day filed a cash bond.

The case was filed with the United States Court of Appeals for the Fourth Circuit on July 3, 1975 and brief for the Petitioners was filed on September 2, 1975 and the brief for the Respondent was filed circa September 28, 1975.

The Fourth Circuit handed down its opinion on December 3, 1975 Affirming the District Court's dismissal of the action stating in effect that the actions of the Petitioner's attorney were attributable to the Petitioners and that the Petitioners weren't without fault themselves.

The basis for jurisdiction in the District Court for the Southern District of West Virginia is found in Title 28 USC 1331 and Title 28 USC 1332.

REASONS FOR GRANTING WRIT

Petitioner respectfully states that the United States Supreme Court should grant the writ of Certiorari in this case because of the important question of a federal district court's duty in not allowing an attorney to hold himself out as a member of a federal bar with the implied promise of competency thereof to the general public in contravention of this Courts Ruling in Link v.. Wabash R. Co. (1962) 370 US 626, 825 Ct 1386, 8 L ed 2d 734. And in contravention to the Fourth Circuit Court of Appeals own holding to the contrary in Reizakis v. Loy (1974 Ca 4 Va) 490 F 2d 1132 and cause that incompetency to be attributed to his client thereby justifying dismissal of his case with prejudice when the client has exhibited no history of dilatoriness himself, while the respondent himself was guilty of many omissions in causing the case not to be ready for trial.

While the Petitioners themselves are not entirely blameless; they missed a deposition, which was given two months later, the Respondent and the Petitioner's attorney's ignored the trial judges order to file pre-trial matters. Most of the blame must fall on the attorney for the Petitioners who did not notify the Petitioners of the deposition, and who did not attend the deposition, did not make any discovery, and by his own admission was totally unprepared. He did not notify the attorney for the Respondent of the fact that one of the Petitioners was unavailable for that deposition because his wife was on her deathbed and the other Petitioner was at his side. This case at the time of its dismissal was 16 months old. The complaint was filed on December 4, 1973 and the order of dismissal was granted on April 30, 1975.

Wherefore, the Petitioners respectfully move that a Writ of Certiorari issue from this Honorable Court noting jurisdiction of this cause.

Garis L. Pruitt
Attorney for Petitioners
P. O. Box 405
Ashland, Kentucky 41101

PROOF OF SERVICE

I, Garis L. Pruitt, attorney in the offices of Pruitt & Duvall, attorneys of record for Roy Pauley and Donald Wilmoth, petitioners herein, depose and say that on the 3rd day of March, 1976, I served a copy of the following petition for Writ of Certiorari to the Supreme Court of the United States, on Honorable Ralph C. Dusic Jr., of the firm of McKittrick, Vaughn, Dusic and McCormick attorneys for Respondent and Honorable Roger W. Tompkins II, Attorney for the Respondent, by mailing three copies of the same to his offices located at 804 Commerce Sq., Charleston, West Virginia, 25301, Honorable Roger W. Tompkins II, 1200 Commerce Square, Charleston, West Virginia, also to Honorable Thomas M. Chattin, attorney for petitioner on appeal, No. 8 Capitol Street, Charleston, West Virginia 25301, and Honorable Stephen P. Meyer, attorney for petitioners before the District Court, 1519 Charleston National Plaza, Charleston, West Virginia. 25301.

Garis L. Pruitt
Attorney for Petitioners
P. O. Box 405
Ashland, Kentucky 41101

State of Kentucky

County of Boyd

Subscribed and sworn to before me on this the 3rd day of March, 1976.

My commission expires August 8, 1979

Audrey Conley
Notary Public

SEAL

APPENDIX

28 USC 1331

Section 1331. Federal question—Amount in controversy—Costs.— (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 USC 1332

Section 1332. Diversity of citizenship—Amount in controversy—Costs'— (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States . . .

(c) For the purposes of this section, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business; . . .

FRCP 41B

Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

BLEED THROUGH

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

At Charleston

ROY PAULEY AND DONALD WILMOTH,
D/B/A Ziebart Auto Truck Rustproofing,
Plaintiffs,

vs.

ZIEBART PROCESS CORPORATION,
A Corporation,
Defendent.

Civil Action No. 73-348 CH
Entered Apr. 30, 1975 - Ceicil
Order Book, No. 45, Page 246

ORDER

On April 30, 1975, came the plaintiff, Roy Pauley, by Stephen P. Meyer, his attorney, there being no appearance in person by plaintiff Donald Wilmoth, and came the defendant, by Roger W. Tompkins and Ralph C. Dusic, Jr., its attorneys, said parties appearing by virtue of an Order entered herein by this Court setting this action for trial to a jury on April 30, 1975.

Whereupon counsel for the plaintiffs moved the Court for a continuance on the grounds that the plaintiff's attorney, Stephen P. Meyer, had been dismissed as counsel for the plaintiff, the plaintiff indicating that he desired to retain the services of Thomas Chattin to further represent him in this civil action, and that neither of said counsel was prepared for trial;

Whereupon counsel for the defendant objected to the motion for a continuance and moved the Court to dismiss this action with prejudice, pursuant to the provisions of Rule 41(b) of the Federal Rules of Civil Procedure, for failure of the plaintiff to prosecute this action;

Whereupon the Court proceeded to hear argument of counsel with respect to the oral motions made in open court;

Whereupon having considered the arguments of counsel, the Court is of the opinion to, and does hereby ORDER and ADJUDGE that the motion of plaintiffs for a continuance be, and the same is hereby denied; that this action be, and the same is hereby, ORDERED dismissed and stricken from the docket of this Court, with prejudice, pursuant to the provisions of Rule 41(b) of the Federal Rules of Civil Procedure, for the failure of plaintiffs to prosecute this civil action; that the transcript of the hearing on said motions be and the same is hereby filed and made a part of the record in this proceeding; and that the defendant be awarded its costs herein; to all of which the plaintiffs do hereby object and except.

ENTER: This 30 day of April, 1975

K. K. HALL, JUDGE

Presented By:

ROGER W. TOMPKINS
RALPH C. DUSIC, JR.
Counsel For Defendant

BLEED THROUGH

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1658

ROY PAULEY AND DONALD WILMOTH,
D/B/A Ziebart Auto Truck Rustproofing,
Appellants,
v.
ZIEBART PROCESS CORPORATION,
A Corporation,
Appellee.

Appeal from the United States District Court for the Southern Dist. of West Virginia, at Charleston. K.K. Hall—District Judge.

Submitted: November 12, 1975
Decided: December 3, 1975

Before BUTZNER, RUSSELL, and FIELD, Circuit Judges.

Thomas M. Chattin, for appellants; Ralph C. Dusic, Jr., (McKittrick, Vaughan, Dusic & McCormick, and Robert W. Tomkins, II) for appellee.

PER CURIAM

Roy Pauley appeals from an order dismissing his antitrust action against Ziebart Process Corporation for failure to prosecute pursuant to Fed. R. Civ. P. 41(b). He argues that the district court's action unduly penalizes him for the negligence of his attorney. When the case was called for trial, he asserted that he discovered his attorney's lack of preparation only a week before, and his new attorney was unable to prepare for trial in the short time available.

A dismissal for lack of prosecution should be reversed only if the trial judge abused his discretion. Link v. Wabash R.R., 370 U.S. 626, 633 (1962). Assessing this discretion, we have held that courts should be reluctant to punish a client for the behavior of his attorney when the client was blameless. Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974); Bush v. United States Postal Service, 496 F.2d 42 (4th Cir. 1974). The record shows, however, that the plaintiffs in this case are not blameless.

This case was brought by Pauley and Donald Wilmoth, a business associate, in December 1973. The defendants unsuccessfully moved to dismiss for lack of jurisdiction. They gave notice to take depositions of the plaintiffs in September 1974, but Pauley and Wilmoth did not appear. On October 15, 1974, the district court denied a motion to dismiss for failure to appear for deposition and ordered Pauley and Wilmoth to pay the expenses Ziebart had incurred in arranging the deposition. At a pre-trial conference in January 1975, the district court established a schedule for completing discovery and filing a pre-trial brief and requests for a charge. No discovery was undertaken, and no brief or instructions were filed. The plaintiffs' claim that they did not discover their attorney's inaction until just prior to trial is inconsistent with the importance they now place upon the case. Wilmoth apparently never contacted counsel, for he, did not appear for trial and his absence was never explained. Pauley never explained why he failed to note his counsel's lack of preparation until the eve of trial.

Upon consideration of the entire record including the plaintiffs' own derelictions, we conclude that the trial judge acted discreetly in dismissing the case for lack of prosecution. Accordingly, we dispense with oral argument and affirm the order of the district court.

BLEED THROUGH

CIVIL DOCKET
UNITED STATES DISTRICT COURT

CA-73-348 CH

ROY PAULEY AND DONALD WILMOTH,
D/B/A Ziebart Auto Truck Rustproofing,
Plaintiff,

vs.

ZIEBART PROCESS CORPORATION,
A Corporation,
Defendant.

Attorneys:

For plaintiff: Stephen P. Meyer, 1519 Charleston National Plaza, Charleston, W. Va. 25301 - Phone: 343-0181

For defendant: Ralph C. Dusic, Jr. (Ziebart Process Corp.), 804 Commerce Sq., Charleston, W. Va. 25301

and

Roger W. Tompkins, II, 1200 Commerce Sq., Charleston, W. Va. 25301 - Phone: 344-9621

Basis of Action:

Federal question; Section 1 Sherman Act and Section 3 Clayton Act; action for money damages; allege breach of contract; demand $150,000.00 and jury trial.

Statistical Record	*Costs*	*Date*	*Receipt No.*
U.S. 5 mailed	Clerk	1973	
		12/4	64877
		12/6	US Dep. 16
U.S. 6 mailed	Marshal		
Basis of Action:	Docket fee		
	Witness fees		
Action arose at:	Depositions		

Date	*Proceedings*
12/ 4/73	(1) Filed Complaint (Exhibit A not attached)
12/ 4/73	Issued Summons and two copies - ret. 30 days
12/13/73	(2) Filed U.S. Marshal's Return on Sum. & Comp.
12/27/73	(3) Filed; Letter from St. Aud. acdepting service on Ziebart Process Corp. with attached retn recept card
1/ 7/74	(4) Filed: Defendant's motion for dismissal
1/28/74	Filed: Court reporter's shorthand notes for 1-28-74
1/28/74	(5) Filed; Affidavit Re; Doing business in W. Va. of E. J. Hartman
2/ 8/74	(6) Filed; Answer of defdt Ziebart Process Corp.
2/ 9/74	(7) Filed: Answer of the pltfs to dfdt's counterclaim
6/ 5/74	(8) Filed: Defdt's notice to take discovery deposition Roy Pauley et al
7/ 8/74	Received: Deposition of Linda K. Boyd
7/18/74	(9) Filed: Defdt's motion to dismiss with notice of motion and exhibits attchd
9/ 6/74	Filed: Court reporter's shorthand notes for 9-6-74
9/12/74	(10) Filed: Defdt's notice to take discovery depositions Roy Pauley et al
10/15/74	(11) Order: Overruling Motion to Dismiss and ordering pltf's to pay all expenses incurred re scheduled deposition
11/27/74	Received: Discovery depositions Roy Pauley & Donald Wilmoth in one volume
1/27/75	(12) Pre-trial order: Setting TD set for 4-30-75 etc
4/28/75	Filed: praecipe; 1 set spa duces tecums & 3 sets spas behalf defdt
4/30/75	(13) Order: Action dismissed pursuant to Rule 41(b)
5/ 6/75	Filed: Courtreporter's stenomask notes of 4-30-75
5/ 7/75	(14) Filed: Pltfs' notice of appeal
5/ 7/75	(15) Filed: Receipt (copy) of cash appeal bond
5/15/75	(16) Filed: Transcript of proceedings 4-30-75 before Judge K.K. Hall
5/16/75	Copy of notice of appeal mailed to Ralph C. Dusic & Roger Tompkins, II.

BLEED THROUGH